IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2009 Session

LAURA LEA SPARKMAN v. DAVID JEREMY LYLE

Appeal from the Circuit Court for Warren County
No. 366 Larry B. Stanley, Jr., Judge

No. M2008-01507-COA-R3-CV - Filed August 19, 2009

This appeal concerns Mother's petition for contempt against Father for failing to pay child support pursuant to the Final Decree of Divorce, and Father's counter-petition to modify the parenting plan. At the time of the divorce, Father was unemployed but seeking employment. The Final Decree of Divorce required Father to pay child support of $100 per week "until such time as [Father] obtains employment, at which time the amount of child support to be paid will be 21% of current income." When Father obtained employment, he paid child support in the amount of 21% of his income, which was less than $100 per week. No order was entered modifying the child support obligation in the Final Decree. Months later, the petitions at issue were filed. Following a hearing, the trial court found that Father was in contempt for failing to pay the specified amount of $100 a week until the date an order was entered modifying his child support obligation. The trial court also dismissed Father's counter-petition finding no material change in circumstances existed for modification. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Jonathan L. Miley, Old Hickory, Tennessee, for the appellant, David Jeremy Lyle.

Thomas F. Bloom, Nashville, Tennessee, for the appellee, Laura Lea Sparkman.

OPINION

The marriage of Laura Lee Sparkman (Mother) and David Jeremy Lyle (Father) produced one child, born on July 31, 1998. They were granted a divorce pursuant to a Final Decree of Divorce entered *nunc pro tunc* as of December 19, 2000.[1] The Final Decree of Divorce named Mother as the

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[1] The Final Decree was signed by the trial judge on August 28, 2001, and filed with the clerk the same day, yet the Decree states the matter came on for hearing on December 19, 2000, and counsel for both parties approved the entry
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primary custodian of the parties' only child and ordered Father, who was unemployed at the time, to pay $100 per week in child support "until such time as [Father] obtains employment, at which time the amount of child support to be paid will be 21% of current income."

When Father obtained employment in 2001, which paid little, he began paying child support in the amount of 21% of his income, which was substantially less than $100 per week, and the payments he remitted were not timely. No order was entered modifying the child support obligation in the Final Decree.[2] On April 2, 2004, Mother filed her petition for contempt for unpaid child support. In her petition she also alleged that he failed to fulfill his obligations to pay his share of the child's uninsured medical and dental expenses. Father filed an Answer and a Counter-Petition to modify the parenting plan to designate him as the primary residential parent. A hearing on Mother's contempt petition was set for June 8, 2004, but was stayed while Father was deployed to Iraq with the National Guard. Thereafter, no action was taken until September 2007, when an Agreed Order was entered that modified Father's child support obligation, providing that Father would pay $326 a month in child support.

Following an evidentiary hearing on both petitions on June 9, 2008, the trial court found that Father was obligated under the Final Decree of Divorce to pay the specified amount of $100 per week and the obligation to pay $100 per week remained in effect until the Agreed Order was entered on September 4, 2007, which modified his child support obligation. The court also found that Father had failed to pay his share of the child's uninsured medical and dental expenses. As for Father's counter-petition to modify the parenting plan, the trial court dismissed his petition based upon the finding that Father had failed to prove a material change in circumstances. This appeal followed.

ANALYSIS

Father raises two issues on appeal. Father appeals the trial court's finding that Father was to pay the minimum of $100 per week in child support from the date of the original decree until the date of the Agreed Order modifying such support. He also contends the trial court erred in dismissing his petition to modify the parenting plan based on the finding that no material change of circumstances had occurred.[3] For her issue, Mother asserts that she should be awarded attorney's fees on appeal. We will address each issue in turn.

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[1](...continued)
of the Final Decree which stated: "ENTERED NUNC PRO TUNC as of December 19, 2000."

[2]Whether Father was advised at the time of divorce that he would need to return to court once he obtained employment to have an order entered stating the exact amount of his child support payment, which was to be based on 21% of his income, is not apparent from this record.

[3]Father also contends the trial court applied the wrong legal standard for change of circumstances. We find no merit to this contention.

CHILD SUPPORT

The child support provision in the Final Decree at issue required Father to pay child support of $100 per week "until such time as [Father] obtains employment, at which time the amount of child support to be paid will be 21% of current income." Father insists on appeal that the provision clearly provides that once he obtained employment, no matter how modest, his obligation to pay child support was 21% of whatever he was earning at that time, not $100 a week.

We acknowledge that Father's interpretation is not an unreasonable interpretation of the unfortunate provision in the Final Decree; nevertheless, whether this provision is or is not subject to one or more interpretations is of no legal consequence. This is because it is well-established that "a child support order based on a percentage of income is not permissible, but must be fixed in *a definite monthly amount.*" *Brown v. Brown*, No. E2005-00464-COA-R3-CV, 2006 WL 236933, at *2 (Tenn. Ct. App. Jan. 31, 2006) (emphasis added) (citing *Price v. Price*, No. M1998-00840-COA-R3-CV, 2000 WL 192569 (Tenn. Ct. App. Feb.18, 2000); *Robertson v. Robertson*, No. 03A01-9711-CV-00511, 1998 WL 783339 (Tenn. Ct. App. Nov.9, 1998); *Varnell v. Varnell*, No. 03A01-9802-CH-00075, 1998 WL 474080 (Tenn. Ct. App. July 29, 1998); *Smith v. Smith*, No. 01A-01-9705-CH-00216, 1997 WL 672646 (Tenn. Ct. App. Oct. 29, 1997); *Lovan v. Lovan*, No. 01A01-9607-CV-00317, 1997 WL 15223 (Tenn. Ct. App. Jan.17, 1997); *Goolsby v. Goolsby*, No. 134, 1986 WL 14046 (Tenn. Ct. App. Dec.12, 1986)). $100 per week is a definite amount; 21% of an unspecified income is not.

The Tennessee General Assembly has made it perfectly clear: provisions that provide for fluctuating child support obligations are not permissible. *See* Tenn. Code Ann. § 36-5-101(a)(2). Instead of providing a formula by which a child support obligation might fluctuate, the courts of this state are under an affirmative obligation to provide for the future support of a child "by fixing some *definite amount or amounts* to be paid in monthly, semimonthly, or weekly installments, or otherwise, as circumstances may warrant . . . ." Tenn. Code Ann. § 36-5-101(a)(2) (emphasis added).

Unfortunately, the Final Decree of Divorce, entered *nunc pro tunc* as of December 19, 2000, which was signed by counsel for both parties and the trial judge,[4] was not in compliance with Tenn. Code Ann. § 36-5-101(a)(2), *Goolsby v. Goolsby*, 1986 WL 14046, at *3, or its progeny. As a consequence, it was erroneous to the extent it suggested that Father could pay a fluctuating amount of child support.[5] *See Brown v. Brown*, 2006 WL 236933, at *3 (holding that to the extent the

[4] The trial judge who decided the issues in this post-divorce dispute is not the same judge who signed the non-complying order in 2000. Moreover, counsel for the parties on appeal are not the same counsel who represented the parties at the time of the divorce in 2000.

[5] As the numerous opinions above reveal, this is not a new issue; to the contrary, it is unfortunately a recurring problem, one that can be avoided by attentive counsel and judges. Counsel for parties in divorce and post-divorce proceedings, as well as the court, have an affirmative duty to assure that child support orders are in compliance with applicable law.

Judgment "would be subject to an increase by a percentage, was erroneous on its face, in violation of Tenn.Code Ann. § 15-101(a)(1)(A)").

We, therefore, affirm the trial court's determination that Father was obligated to pay the "definite amount" of $100 a week from the date of the Final Decree of Divorce until September 4, 2007, when the Agreed Order was entered that specified that Father's obligation was to pay the "definite amount" of $326 per month thereafter.

MATERIAL CHANGE OF CIRCUMSTANCES

The threshold issue in modification proceedings is whether a material change in circumstances affecting the child's best interest has occurred since the adoption of the existing parenting plan. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *see also Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). The petitioner bears the burden of proof. Tenn. Code Ann. § 36-6-101(a)(2)(B).

For purposes of modifying the designated primary residential parent (formerly "custodian") the petitioner must prove by a preponderance of the evidence "a material change in circumstance." Tenn. Code Ann. § 36-6-101(a)(2)(B). "A material change of circumstance does not require a showing of a substantial risk of harm to the child." *Id.* For purposes of this section, "[a] material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child." *Id.*

The following factors are considered an appropriate basis for holding that a material change in circumstances has occurred: (1) the change occurred "after the entry of the order sought to be modified," (2) the change was "not known or reasonably anticipated when the order was entered," and (3) the change "affects the child's well-being in a meaningful way." *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)); *see also Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993) (holding a change of circumstances affecting the welfare of the child may include any "new facts or changed conditions that could not be anticipated by the former decree"). If the petitioner fails to establish the threshold issue, that a material change of circumstances has occurred, the petition is to be denied and modification is not to be considered.[6] *See Kendrick*, 90 S.W.3d at 570; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006); *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999).

[6] If a material change in circumstances has occurred, it must then be determined whether modification of the plan is in the child's best interests. *Marlow v. Parkinson*, 236 S.W.3d 744, 749 (Tenn. Ct. App. 2007) (citing *Kendrick*, 90 S.W.3d at 570; *Blair*, 77 S.W.3d at 150). If it is not proven that a material change in circumstances has occurred, the petition is to be denied. See *Blair*, 77 S.W.3d at 151 (affirming the judgment of the trial court not to grant the petition to modify the previous custody order based upon the trial court's finding that the evidence failed to show the existence of a material change in circumstances).

Father contends that there have been many positive changes in his circumstances since the time of the parties' divorce that affect the child in a meaningful way. Father is now employed by and part owner of Home Energy Concepts Corporation. Further, he is no longer living with his parents, as he was at the time of divorce. He has his own home where he lives with his wife, stepson, and four-month-old daughter, and the child would have her own room. He also contends that Mother has been the victim of domestic violence and that she and her husband have separated on three occasions, which adversely affects the child. It is upon these facts Father mainly relies to contend that a material change in his circumstances has occurred since the divorce that affects the child in a meaningful way.

The trial court found that Father failed to establish that a material change in circumstances affecting the child's best interest had occurred since the divorce. This court reviews such decisions based upon the de novo standard of review, which affords the presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick*, 90 S.W.3d at 569. After a thorough review of the record, we find that the evidence does not preponderate against the trial court's finding that Father did not meet his burden of proving that a material change in circumstances has occurred since the adoption of the existing parenting plan.

It is significant to recognize the material changes Father relies upon must be ones that were not anticipated when the decree to be modified was entered. *See Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993) (holding a change of circumstances affecting the welfare of the child may include any "new facts or changed conditions that could not be anticipated by the former decree"). We are unable to conclude that the improvements in Father's financial circumstances, finding a good job, buying a nice home, which is equipped with swing sets and a trampoline, were not anticipated. As for the troubling circumstances regarding Mother's domestic relationship with her husband, this does constitute a change that was not anticipated at the time the decree to be modified was entered; however, Mother disputed much of Father's evidence and testified that her domestic circumstance had substantially improved. Although this court is concerned with the existence of domestic violence Mother experienced, particularly to the extent it may affect the child, we recognize that Mother had answers for most of Father's concerns. More significantly, for purposes of appeal, the trial court found Mother's explanations satisfactory and Father's evidence insufficient to satisfy his burden of proof. Having reviewed the same evidence as the trial court did, including the fact that the child is happy, well-adjusted and has thrived while Mother has served as the primary residential parent, we are unable to conclude that the evidence preponderates against the trial court's finding.

We, therefore, affirm the trial court's dismissal of Father's petition to be designated the primary residential parent.

MOTHER'S ATTORNEY'S FEES ON APPEAL

Mother requested an award for her attorney's fees on appeal. We will analyze her request by first looking to Tenn. Code Ann. § 36-5-103(c), which provides in relevant part:

> The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

In cases involving the custody and support of children "counsel fees incurred on behalf of minors may be recovered when shown to be reasonable and appropriate." *Taylor v. Fezell*, 158 S.W.3d 352, 360 (Tenn. 2005) (quoting *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn. 1989)). "The purpose of these awards is to protect the children's, not the custodial parent's, legal remedies." *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992). There is no absolute right to such fees; instead, the court is afforded the discretion to award attorney's fees in such cases, *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004), but "their award in custody and support proceedings is familiar and almost commonplace." *Taylor*, 158 S.W.3d at 360. Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995).

In determining whether an award for attorney's fees is warranted, we consider, *inter alia*, the ability of the requesting party to pay his or her own attorney's fees, that party's success on appeal, and whether that party has acted in good faith. *Shofner*, 181 S.W.3d at 719. Considering Mother's success on every issue on appeal and the good faith demonstrated by Mother throughout these proceedings, we hold that her request for attorney's fees is proper.

We, therefore, remand the issue to the trial court to set a reasonable fee for the services rendered by Mother's counsel on appeal.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellant, David Jeremy Lyle.

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FRANK G. CLEMENT, JR., JUDGE